

The impact of the Racial Equality Directive:
a survey of trade unions and employers
in the Member States of the European Union

Germany

Dr. Michael Whittall

Anne Mueller

Waldtraut Lotz

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1. Demographic background

Germany, the EU's largest member state, has a population of over 82m (Statistische Bundesamt) of which 7.3 million have a migrant background, representing between 8.8 and 9.1 percent of the total population according to the Bundesamtes für Migration und Flüchtlinge (2008). Although the first migrant workers came to Germany in the 1860s, Italian workers employed on the German railways, today's migrants can be traced back to the 1950s when Germany signed agreements on migrant labour with Italy, Greece, Turkey, Spain, Portugal and the former Yugoslavia. Today the largest group of non-nationals are Turkish, around 1.7m, followed by Italians and Serbs, roughly half a million each, and then by Poles and Greeks. There are four other 'national minorities' that have lived within the German borders for centuries (Danes, Frisians, Roma and Sinti, and Sorbs), and around a quarter of a million Afro-Germans and African nationals. There is also a significant Jewish population of around 200,000 people. According to the Confederation of German Trade Unions (DGB 2008: 4), around 3.77 million non-German citizens have lived in Germany for longer than 10 years. Furthermore, the majority of migrants in Germany find themselves working in low-skilled and precarious jobs and as consequence many are reported to have suffered considerably as a result of labour market restructuring in recent years.

2. Industrial relations background

Germany has had a strongly structured but evolving industrial relations system since the Second World War. Since the 1950s the key characteristic of the system has been its dual structure, with legally guaranteed Works Council representation and some degree of social partnership and consultative forms of co-decision making occurring within the workplace or company and the right to sign collective agreements on pay reserved to the trade unions and employers associations at a sector level. While there was considerable harmonisation between East and West Germany after 1989 there are, however, still quite big differences: collective bargaining covers around two-thirds of West German employees but only half of East German, and throughout Germany it is on the decline. Trade unions and employer organisations also have stronger membership levels in West than in East Germany although these too are in decline. Trade union density is now around 29 per cent, and recent union mergers mean that the eight German trade unions affiliated to the DGB (*Deutscher Gewerkschaftsbund*), the Confederation of German Trade Unions, now have approximately 6.5m members. The employers' organisations have declined much less. They are grouped in one compulsory organisation, namely the Confederation of German Industry (*Bundesverband der Deutschen Industrie - BDI*) which represents trade interests. A high proportion of employers are also members of the Confederation of German Employers' Associations (*Bundesvereinigung Deutscher Arbeitgeberverbände - BDA*).

Increased global competition and the cost of unification, however, has left its mark on what Streeck (1995) calls '*German capitalism*'. Today employers' commitment to 'interest convergence' (Sorge, 1999) is no longer guaranteed. An increasing number of companies are withdrawing from national collective bargaining, favouring local bargaining instead. Finally, what can be described as 'co-determination free zones',

areas with no-employee representation, are on the rise (Artus, 2006; Trinczek, 2006; Abel, 2001).

3. Trade union and Employer awareness

All the trade union respondents interviewed indicated a high level of awareness and understanding of the General Act of Equal Treatment (GAET). On the one hand this awareness was the result of a very public and heated debate concerning the necessity of GAET that took place between 2001 and 2006. During this period German business and the Conservative parties were strictly opposed to the proposed new laws. The BDA interviewee categorically stated, for example:

We both, and here I think I can speak for the BDI too, opposed the law. We tried to stop the law.

On the other hand, German unions' knowledge of the new laws also had to do with the fact that they were involved, indirectly via the DGB, in influencing the proposed new legislation, helping lobby for it independently and through the ETUC in 1999. An IG Metall interviewee noted:

The IG Metall as an individual union was not directly involved in the negotiations. Rather the whole negotiations ran via the DGB. The consultations and policy positions ran via the DGB and we worked closely with the DGB.

As early as 1999 the DGB played an active role in the development of the EU equality directives. Together with the German ministry of justice and the interior ministry, the DGB was active in Brussels in an attempt to influence the character of Directives 43 and 78. Undoubtedly, the DGB benefited from the fact that the Red/Green coalition was in office at the time, the SPD and Greens being sympathetic to the issue of anti-discrimination. Once the Directives were passed the DGB negotiated intensively with the Ministry of Justice about their transposition into German law, focussing especially on the rights of works councils and trade unions to consult and support victims of discrimination:

After Directives 43 and 78 were passed we negotiated intensively with the ministry of justice concerning how the Directives would be transposed into German law. The DGB developed its own recommendations. For example, the kind of consultation and support victims should get as well as what rights works councils and trade unions should be provided with.

The employers interviewed were equally aware of the law, even if they were largely sceptical. Some employers even denied discrimination was an issue in Germany and for this reason felt the law was superfluous. One stated:

I believe such a law is superfluous because companies do not behave in a racist way. They cannot afford to. When we employ people the only question that counts is whether they can do the job and whether they can fit into our organisation... We have certain rules, codes of behaviour, and they are independent of religion, race and national origins.

Generally, though, employers were resigned to the fact that GAET, based on EU Directives, had to be implemented. A position exists in which employers are committed to reducing GAET's impact as far as possible. Gesamtmetall, the German engineering industry employers' association, accepted the Directive had to be implemented, but wanted it to be done with as light a touch as possible. It argued:

It was not possible to stop the law because the Directive was already in place and it had to be transposed. So you could not say "stop the law". What you could say though was "restrict it as best as possible"... Germany, certainly under the red/green government, had the tendency to implement more than was really necessary... And we said "Do what Europe requires, but not more".

Though clearly a minority position it needs to be recognised that some employers actually welcomed GAET. Although acknowledging the new laws could be time and cost intensive, they nevertheless saw an opportunity to both place discrimination once again on the agenda as well as reconsider their own policies. A Deutsche Post interviewee, for example, noted: *[W]e were a little isolated. A lot of companies in Germany were against GAET. Such a position was never an issue for us.'*

An interviewee representing the local government employers association was also quite positive towards the new laws:

We were quite shocked at first about the bureaucracy involved... Ok, we viewed the law's aims positively, that is clear. The law's intention is totally correct. It is very desirable that discrimination at the workplace and other areas does not occur.'

Despite the negative approach to the legislation, which many employers continue to argue is costing German industry too much, 500 companies have signed up to a 'Diversity Charter' that was launched by four leading companies in December 2006. The timing of the charter and its aim of valuing employees irrespective of gender, race, nationality, ethnic background, religion, disability and sexual orientation suggest GAET was the catalyst for this development. The BDI has also been active in fighting racism, holding an event against xenophobia in the aftermath of a series of very public racial attacks on the streets of Germany. Both the BDI and the BDA insist that an increasing number of German companies have implemented employment procedures and put in place diversity officers/departments to ensure that they not only comply with the new equality laws but also that such measures help contribute to a positive working environment. Discussing the situation at German Rail (the DB), the respondent noted that it has professionalised its recruitment process: *'When choosing a new employee it does not simply involve someone looking at their application form, rather it now involves processes and procedures which regulate such activity.'*

4. Comments on the Equality Body

Although union interviewees were generally aware of the German Equality Body, the Anti-Discrimination Agency (AA), they were equally critical of it, too. The main criticism concerned a belief that it was not independent of either the government or

employer associations. Even though the DGB sits on the AA's Advisory Board (with the DBA) a Ver.di interviewee explained:

We need an independent office that implements this. It has to have a remit which is not set by the government - rather it needs to be independent... Because our experience shows that it is only through such independence that such developments (campaigns) can be guaranteed. Why is it, for example, that this office has only made agreements and campaigns with one part of the social partners - only with the employers?

Furthermore, it was suggested that the existence of a single agency contact point, severely undermines the new anti-discrimination laws. Hence, a single office not only lacks the necessary resources to support victims but also its profile is deemed as undermined. According to an interviewee from the chemical union: *'When you contact them (AA) as an individual you are fobbed off. "That is not our job". That is my experience anyway.'*

A similar position was also taken up by the German police union. Although the union had good contacts with the agency, this involved it visiting the AA to get a better understanding of its tasks, an interviewee from the police union felt its work was undermined by a lack of resources:

It (general lack of awareness that the anti-discrimination office exists and what its responsibilities are) is possibly because there have not been any particular intelligent campaigns which have attempted to inform people generally that this office exists to help people. And this certainly has to do with a lack of finances.'

Generally, although union officers were aware of the agency's existence, such awareness was not observed at the lower echelons of trade union structures. An IG Metall member very active in fighting race discrimination noted, for example: *'No I have not heard of it (the AA). Normally though I am very often in contact with such organisations. Yesterday I was in Dusseldorf at a Pro Qualification meeting but I have not heard of that office. I have never heard of the AA office.'*

On the employers' side, individual company respondents were less likely and employers' association respondents more likely to be aware of the AA. However, both questioned its value. The metal workers' (engineering) employers argued:

At the beginning the people (AA employees) said that they had so many calls daily. But I have the feeling that when they have so many calls then they are required to offer so many answers and through such activity it (AA) begins to produce a life of its own... If I am honest, I believe it is totally superfluous. Because the job of keeping the public informed can be done by the government's press office... I would get rid of it [AA] straightaway.

Relations between the AA and employer representatives appear to have been strained after the AA published a report on the costs associated with the new anti-discrimination laws. The AA report placed in question the employer associations' claim that companies' had incurred costs of €1.73 billion since the introduction of the law - a figure based on a study conducted on their behalf by Dortmund University.

According to the AA's report, the new laws had only cost €26 million. The BDA and BDI, however, were able to put pressure on the AA to stop the report being published, with the employers claiming that the AA study was not scientifically founded.

5. Trade union and employer policies and measures

5.1 Trade union policies and measures

Although German trade union's commitment to fight racism can be dated back to at least the 1970s, it was only with the passing of the 'Florence' agreement, signed by the ETUC and UNICE in 1995, that the problems faced by migrant employees in Germany started to be taken more seriously. Today it is not uncommon that a trade union has a migrant department. The DGB interviewee noted:

In the 90s many works councils supported this agreement (Florence) and as a result signed company agreements. These company agreements go much further than the law set down by GAET. They not only address the question of what happened when discrimination occurs, rather the agreements involve preventative measures to protect people from discrimination.

Since then many works councils have signed anti-discrimination agreements. In addition, almost all unions have long-standing national, regional and local migration committees. In 2003 IG Metall passed a 'migrant worker promotion programme', an attempt to increase the number of union officers/committee members with a migrant background to 10 per cent. A Ver.di interviewee believed the theme of migration and migrant workers' rights 'has moved higher up the agenda'. An interviewee from the mining, chemical and energy workers' union's migrant worker department (IGBCE) confirmed this: 'The department's significance has undoubtedly increased in my opinion. And that I notice by the fact that I am increasingly being involved in more issues. And I have the support of the board in all things.'

As a consequence trade unions have undertaken various measures to promote their work in this area. The IG Metall, the country's largest union, organised a national migration conference in 2007, while the chemical union, the IGBCE, has held events in support of the 'Do not harass my mate' campaign organised by the DGB.

However, such positive actions should not distract from the fact that fighting racism and supporting employees with a migrant background remains to a great extent a fringe issue. Trade union respondents believed that much of this positive work is viewed with a degree of apathy on the part of many employee representatives. A respondent from the Food, Beverages and Catering Union, the NGG noted: 'On paper I am responsible for this area (migrant workers), but I very rarely get questions concerning this area... I try to do my best. But then I have to consider what resources I have at my disposal.'

In some cases unions have had to cancel training seminars on the equality laws because of a lack of interest on the part of works councils. These works councillors (who are also usually trade union members) are reported to be frequently more concerned with other priorities, and are sometimes reluctant to defend the rights of all

employees. There are still fewer than 5 per cent migrant-origin works councillors in the metal working industry, although the number of shop stewards is higher than that. One IG Metall interviewee explained:

Politically it (migrant workers) is an issue within the union which has little standing. The colleagues (migrant employees) complain about this because they say “when it comes to going on strike we are the first on the street, while the German colleagues run for cover”.

An IG Metall member employed at a major company pointed out the resulting contradiction: *‘Officially, then, there is no racism here, officially. But unofficially it is naturally very different.’*

One illustration of the structural discrimination that exists against migrant workers was given by another IG Metall trade unionist who explained:

Actually the biggest problem is that we are now confronted by mistakes made in the area of integration. Because if I was to evaluate employees with an migrant background then what would surely come out is that 80% are either doing semi-skilled or qualified semi-skilled jobs. And that is a real problem for those affected because those are the jobs in our branch that are disappearing.

5.2 Employer policies and measures

The employers interviewed accepted that they have not been involved in any meaningful social partner events to promote the equality laws. The one exception being that they have undertaken measures to ensure that collective agreements fall within the scope of the new equality laws. An interviewee from BMW pointed out: *‘We scanned all the individual processes to see whether anything did not fit... We also checked all company agreements.’*

The City of Munich also spent a considerable amount of effort ensuring that procedures and materials conform to GAET. The City of Munich interviewee noted that they asked the following question: *‘Do our procedures conform to GAET? Does indirect discrimination occur anywhere? We have considered these factors very intensively.’*

Even given German employers’ critical stance towards GAET they publicly remain committed to fighting all forms of discrimination. For example, German employers can point to a number of high profile campaigns opposing discrimination. These include, the forum to promote women in the economy, ‘Frauen in der Wirtschaft’, supported by household names such as Daimler AG, Deutsche Bahn, Deutsche Bank AG, Deutsche Telekom AG and Deutsche Post AG as well as the already mentioned ‘Diversity Charter’.

A major factor which would appear to have motivated employers to be active in promoting the new legislation to different degrees concerns the fear of potential litigation. This is particularly the case regarding recruitment. A lot of the training that has been undertaken focuses on this issue, specifically informing employers of the

need to be very diligent in documenting the procedures followed when recruiting new personnel. The BDA respondent said: *'An aim of our training concerns avoiding this point (burden of proof). To avoid the appearance that discrimination has occurred, because you can never prove the opposite. Therefore, it was an important point in our training...'*

Interviews with employer associations, for example, revealed that they have informed members against offering candidates reasons why their applications have been unsuccessful. Discussing this issue the DB respondent noted:

But we cannot do this (offer reasons for the failed application). Because if someone who is on the outside and not yet on the inside, they are in no way inhibited from taking legal action. Because of this I believe that there is a feeling that a flood of legal cases would take place.

Generally measures favoured by employers involved training for management, the production of materials for employees and the appointment of an ombudsperson. However, it needs to be recognised that most respondents noted a strong correlation between the size of the company and the measures undertaken. Large companies, for example, with superior resources are most likely to be committed to promoting anti-discrimination policies. An interviewee from Gesamtmetall noted: *'If you take large companies like Lufthansa or BMW, companies which are internationally active, for them there exists a totally different culture to that of a medium size business in Brandenburg around the corner. For them what exists in the law is totally crazy.'*

This stance was supported by the interviewee representing the local government employers' association. The respondent noted that the new laws are especially a problem for small regional employers who are already overstretched. It was pointed out that around half its members, some 2,500 employers, employ less than 20 people:

A personnel manager said to me "I do not have time to read 30 reports which are 60 pages long and on top of that visit a seminar so that I can work out my strategy. I am happy when I get my normal work done." And then I hear "We do not need it, we are only six people and we really get on with each other..."

A representative of the Food, Beverages and Catering Union made a similar observation: *'Large companies have regulated this, medium size companies have first looked at it and considered what they have to do to conform with the laws, and small firms have more than likely done nothing.'*

Furthermore, it needs to be recognised that the question of size is also linked to the fact that large companies are more likely to be unionised and home to German co-determination structures and as a consequence forced to contend with labour's lobbying influence on such issues. At Dussmann, for example, the respondent noted that management had been forced to sign an agreement against bullying after the joint works council pushed for this change. Furthermore, globally active companies are 1) aware of what other countries are doing in this area and 2) they acknowledge the need to promote a positive image of the company. According to BDA and BDI an increasing number of German companies have implemented employment

procedures and put in place diversity officers/departments to ensure that they not only comply with the new equality laws but also that such measures help contribute to a positive working environment.

6. Views on how better to tackle discrimination

The trade union respondents suggested the law should be reformed in various ways, including adding the right to take collective legal cases covering several workers to the AA and the courts. Another demand was for the abandonment of the rented accommodation clause that could be used to hinder non-German residents getting access to public housing. Furthermore, it was argued that more needed to be done to make people aware of their rights. Although acknowledging the undoubted importance of GAET an interviewee from the building union noted:

Employees now have quite a few more possibilities to bring to light problems in relation to migration, and inequality. And to do this without being threatened with sanctions. I think the possibilities that I have as an individual under the new law go far enough in trying to protect me against discrimination; they just need to be used... I think it is now necessary to ensure that people are aware of the law.

On the employers' side, however, the main stance was that the law was a burden. Here two positions can be observed. The first is expressed by an interviewee from a German multinational involved in industrial catering, cleaning, security and personal home care who was in favour of eliminating the legislation: *'Eliminate it. It is a bureaucratic monster. Obviously it will be used as a vehicle when I am not happy with my work.'* A less extreme position was to be observed, though, which envisaged the need to revise the law. This involved considering measures which would make GAET less bureaucratic and cost intensive, in particular the question of burden of proof was referred to on many occasions. The BDA interviewee argued: *'The very first thing we would remove is the burden of proof. Then, this bureaucratic effort that employers have to deal with would be abandoned. It would be a great relief if that was removed.'*

References

- Abel, J./Ittermann, P. (2001): Mitbestimmung im Wandel - Daten und Trends, in: Abel, J./Ittermann, P. (2001): Mitbestimmung an den Grenzen? Arbeitsbeziehungen in Deutschland und Europa, München und Mering, S. 11-37
- Artus, I. (2006) 'Im schatten des dualen Systems: Zur Bedeutung tarifliches Normen in Betrieben ohne Betriebsrat', in Ingrid Artus, Sabine Böhm, Stefan Lücking and Rainer Trinczek (eds) *Betriebe ohne Betriebsrat*, pp 141-170. Frankfurt am Main: Campus Verlag.
- Bundesamt für Migration und Flüchtlinge (2008) 'Ausländerzahlen 2008', http://www.bamf.de/clin_092/nn_442496/SharedDocs/Anlagen/DE/DasBAMF/Downloads/Statistik/statistik-anlage-teil-2-auslaendezahlen-auflage14,templateId=raw,property=publicationFile.pdf/statistik-anlage-teil-2-auslaendezahlen-auflage14.pdfDeutsche Gewerkschaftsbund (2008) *Partizipation statt Ausgrenzung*. Berlin: DGB.
- Sorge, A. (1999) 'Mittbestimmung, Arbeitsorganisation und Technikanwendung,' in W. Streeck and N. Kluge (eds) *Mitbestimmung in Deutschland*, pp. 17-134. Frankfurt am Main: Campus Verlag.
- Statistische Bundesamt,
http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Navigationsknoten__Startseite1.psm1
- Streeck, W. (1995) 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy', in S. Leibfried and P. Pierson (eds) *European Social Policy: Between Fragmentation and Integration*, pp.389-431. Washington D.C: Brookings.
- Trinczek, R. (2006) 'Betriebe ohne Betriebsrat' in Ingrid Artus, Sabine Böhm, Stefan Lücking and Rainer Trinczek (eds) *Betriebe ohne Betriebsrat*, pp 9-42. Frankfurt am Main: Campus Verlag.